NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2011] NZLCDT 29

LCDT 009/11

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**AUCKLAND STANDARDS COMMITTEE 1 OF THE NEW ZEALAND LAW SOCIETY** Applicant
AND	**DAVID ARTHUR GARRETT** Respondent

CHAIR

Judge D F Clarkson

MEMBERS OF TRIBUNAL

Mr P Radich

Ms C Rowe

Ms S Sage

Mr W Smith

HEARING at AUCKLAND on 14 October 2011

APPEARANCES

Mr S Moore SC and Mr M Treleaven for the Applicant

Mr G King for the Respondent

DECISION OF NEW ZEALAND LAWYERS AND CONVEYANCERS TRIBUNAL

[1] David Arthur Garrett ("the practitioner") has admitted one charge of recklessly or negligently swearing a false affidavit or recklessly or negligently omitting to tell the full truth. The actions which formed the basis of the charge occurred in 2005 and therefore penalty is to be determined according to the Law Practitioners Act 1982 ("LPA"), in terms of the transitional provisions of the Lawyers and Conveyancers Act 2006 ("LCA").

Background

[2] The background to this charge has become well-known and follows an incident which occurred in 2002 in Tonga. In that incident the practitioner was assaulted by another person who was convicted of that assault, but in the course of that hearing which occurred in the Magistrates Court in Tonga, for some reason the practitioner also was convicted of an assault (and fined $10), an assault which he has continued to deny.

[3] Mr Garrett filed an appeal in the Supreme Court of Tonga against that conviction. To all intents and purposes such an appeal operates effectively as a stay of the proceedings. That appeal has not been heard as far as the parties have been able to determine.

[4] Mr Garrett was represented at that hearing by a respected and experienced criminal lawyer. The evidence of that lawyer is that he told Mr Garrett that he would not have a conviction unless the Supreme Court confirmed the Magistrate's ruling.

[5] Mr Garrett has maintained a legal practice in Tonga where he worked for some years and therefore travelled to Tonga regularly for business and family purposes. He confirmed to the Tribunal that each time he had returned and encountered his former lawyer he would enquire about the progress of the appeal and would be reassured that these things took time.

[6] Thus in 2005, when Mr Garrett came to swear his affidavit in support of an application for a discharge without conviction, on a charge of forgery, he says that he simply did not turn his mind to the Tongan Court ruling. He swore an affidavit, para 29 of which read:

> "Since being admitted in 1992 I have committed no criminal offence, nor had any disciplinary proceedings brought against me either in New Zealand or Tonga. The worst I could be accused of is incurring some parking and speeding fines."

[7] It is this paragraph which forms the kernel of the charge against him.

[8] It is well known that Mr Garrett succeeded in his application to be discharged without conviction on the forgery charge and indeed also obtained suppression of name and the details surrounding the very unfortunate incident which had occurred 20 years before.

[9] Mr Moore SC submitted to the Tribunal that it would never be known what influence the lack of information about the Tongan matter might have had on the sentencing outcome in 2005. Whilst he accepted that there were many matters to be taken into account in the sentencing exercise, including the length of time since the offending had occurred and the fact that the passport had never been used, it could not be known whether the outcome might have been different had the learned Judge been apprised of all of the relevant facts.

[10] Mr King, for the practitioner, disputed that approach and pointed to that portion of Judge de Ridder's sentencing notes where he said:

> "The passport was not used, and quite frankly summing all this up, Mr Garrett, that to me is the most important factor in all of this."

[11] He submits that the sentencing Judge seems to have placed most weight on the issue of the passport never having been used.

[12] Unfortunately Mr Garrett's lack of frankness in swearing his affidavit was then translated into a submission being filed by his then counsel, Mr Gotlieb, to the effect that Mr Garrett had *"no previous convictions of any kind"*.

[13] Mr Garrett claims he did not prepare those submissions and said he did not even see them before they were put to the sentencing Judge. However, he did not correct them at the time they were made.

[14] There are certainly two places in the sentencing notes of Judge de Ridder in which he refers to Mr Garrett's otherwise having *"a blameless record"* and *"... otherwise led a blameless life ...".* Thus, as always is the case in applications for discharge without conviction, the previous history and perception of character of the offender are relevant.

[15] What is clear, and confirmed by Mr Garrett's admission to the charge, is that the Court should have been fully informed of the circumstances of the Tongan *"conviction"* and the state of the appeal process. Mr Garrett repeatedly stated to the Tribunal that he ought to have given all of the details or alternatively ought to have completely omitted this paragraph; or in other words could have made no reference to his conviction status at all.

[16] His counsel Mr King reinforced this approach by the submission that if a conviction is not put before the Court by the prosecution, that counsel has a duty to remain silent about it, in terms of ethical obligations to a client. Mr King submitted that this would justify silence on Mr Garrett's part also, by totally omitting reference to the Tongan situation.

[17] While we accept unreservedly that this correctly states the position of **counsel** representing a client, we totally reject the submission that this ethical nicety can be afforded to a lawyer who is appearing before a Court as a defendant in a situation where he or she is seeking the Court's indulgence in terms of penalty, particularly in respect of such serious offending as Mr Garrett had admitted.

[18] Mr King submitted that the distinguishing feature of this case was that the wrongful conduct did not involve professional service to a client. It does, however, involve Mr Garrett's relationship with the Court.

[19] In such a situation we consider there is an obligation of utmost good faith and openness.

[20] In his submissions Mr Moore SC cited a passage from Professor Dal Pont:[1]

[1] GE Dal Pont *Lawyers' Professional Responsibility* (4th ed, Lawbook Co, Pyrmont, 2010) at 554, para 25.10.

> "The proper administration of justice necessitates that Courts and Tribunals be able to rely on what a lawyer says and does. For this reason, a lawyer proven to have knowingly and deliberately deceived a Court or Tribunal commits professional misconduct, and is usually struck off. Recklessly misleading the Court will usually also attract a disciplinary sanction, although its severity will depend largely on the degree of recklessness. Conversely, no finding of misconduct follows from an entirely innocent misleading of the Court, lacking any dishonesty or recklessness. Of course, once the lawyer discovers the error, he or she cannot perpetuate it, and must instead bring it to the Court's attention."

[21] There is a further quote from Professor Dal Pont concerning half-truths which we wish to emphasise:[2]

> "**Half-truths**
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> [17.115] Lawyers must eschew statements or conduct that are half-truths, or otherwise leave the Court with an incorrect impression. The observations of the Chief Justice in *re: Thom* are instructive in this context.[3]
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> > "It is perhaps easy by casuistical reasoning to reconcile one's mind to a statement that is misleading by considering that the deponent is not under any obligation to make a complete disclosure. By this means a practitioner may be led into presenting a statement of fact which, although it may not be capable of being pronounced directly untrue in one particular or another, still presents a body of information that is misleading, and conceals from the mind of the Tribunal the true state of facts which the deponent is professing to place before it. For that reason it is proper on such occasion as this to express condemnation of any such casuistical paltering of the exact truth of the case.""

[22] Whilst we remain mindful of the fact that we are dealing with a case of reckless or negligent presentation to the Court rather than of deliberately misleading, we made it plain to Mr Garrett, in delivering a censure in our oral decision of 14 October, that there is a distinction between a lawyer as counsel and a lawyer as defendant (or indeed, in dealing with his or her professional body). While subtle reasoning and careful phraseology, might be admirable qualities when representing a client, they have no place for the lawyer representing himself

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[2] Ibid 384, para 17.115.
[3] (1918) 18 SR (NSW) 70 at 74-75

as an individual. Rather, a lawyer in such a position must be completely open and willing to disclose information contrary to his or her own interests in order to present an accurate depiction of the subject under consideration. Otherwise, how can any Court expect to rely on him or her in future?

Matters in Mitigation

[23] Throughout this investigation culminating in the charge before the Tribunal Mr Garrett has been co-operative and entered a guilty plea at an early date.

[24] The consequences of Mr Garrett's lack of openness to the Court in 2005, when discovered in 2010, have been enormous. He almost immediately lost his political career and therefore his source of income. He suffered huge embarrassment and disgrace in the eyes of his family, his peers and the public generally.

[25] He suffers from health difficulties, details of which have been suppressed. Similarly the financial consequences and circumstances of Mr Garrett have been suppressed but are mitigating factors in terms of any penalty to be imposed.

[26] Mr Garrett has a wife and two young children to support and his legal career is his only means of doing so.

[27] Finally it was agreed by counsel that because the practitioner had applied for a practising certificate 13 months ago, and that had been denied pending the outcome of these proceedings, he has in fact served a de facto suspension of 13 months, which should be taken into account.

Suspension and Comparison with Similar cases

[28] Counsel for the Standards Committee referred us to a number of decisions where a suspension had been imposed on a practitioner. We remind ourselves of

the comments of the Full Court of the High Court in the matter of *Daniels v Complaints Committee 2 of the Wellington District Law Society*:[4]

> "**As to suspension**
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> [22] It is well known that the Disciplinary Tribunal's penalty function does not have as its primary purpose punishment, although orders inevitably will have some such effect. The predominant purposes are to advance the public interest (which include "protection of the public"), to maintain professional standards, to impose sanctions on a practitioner for breach of his/her duties, and to provide scope for rehabilitation in appropriate cases. Tribunals are required to carefully consider alternatives to striking off a practitioner. If the purposes of imposing disciplinary sanctions can be achieved short of striking off then it is the lesser alternative that should be adopted as the proportionate response. That is "the least restrictive outcome" principle applicable in criminal sentencing...
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> ...
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> [24] A suspension is clearly punitive, but its purpose is more than simply punishment. Its primary purpose is to advance the public interest. That [interest] includes that of the community and the profession, by recognising that proper professional standards must be upheld, and ensuring there is deterrence, both specific for the practitioner, and in general for all practitioners. It is to ensure that only those who are fit, in the wider sense, to practise are given that privilege. Members of the public who entrust their personal affairs to legal practitioners are entitled to know that a professional disciplinary body will not treat lightly serious breaches of expected standards by a member of the profession."

[29] We consider the practitioner's failure to be entirely open with the Court which was sentencing him and from which he was seeking a considerable indulgence, of the full circumstances of the Tongan incident was a serious oversight and error. We record the penalties announced in our oral decision of 14 October 2011:

(1) The practitioner is formally censured.

(2) The practitioner is suspended for 12 months; however we note that this period is taken as having already been served.

(3) The practitioner is to pay costs of $8,430 of the Law Society.

[4] [2011] NZAR 639 (HC), at paras 22 and 24.

(4) By consent there is suppression of all personal and financial and health matters referred to in the affidavit material and submissions before the Tribunal; and

(5) There is suppression of any comments concerning the Tongan Justice System.

DATED at AUCKLAND this 11th day of November 2011

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Judge D F Clarkson
Chairperson